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ALEXANDER L. STEVAS,

82-417

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No._____

Palmer G. Holcombe, Petitioner

v

State of Alabama, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Huel M. Love
130 East Street, North
Talladega, Al. 35160

Counsel for Petitioner

August 27, 1982

QUESTIONS PRESENTED

1. Whether Acts of Alabama (1980) No. 80-587 is unconstitutional as violative of the Constitution of the United States because the said act delegates to the prosecuting attorney the inherently judicial function of determining whether the sentencing court is empowered to reduce or suspend the sentence of a defendant convicted under said act.

2. Whether Acts of Alabama (1980) No. 80-587 is unconstitutional as violative of United States Constitutional rights under the Eighth Amendment to be free from cruel and unusual punishment.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No. _____

Palmer G. Holcombe, Petitioner

vs

The State of Alabama, Respondent

Petition for a Writ of Certiorari
To The United States Court Of Appeals For
The Eleventh Circuit

The petitioner, Palmer G. Holcombe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Alabama entered in this proceeding through denial of a petition for certiorari and a certificate of final judgment entered on July 2, 1982.

OPINION BELOW

No opinion was written in this case but was affirmed on the basis of Wheat v. State, Ala. Cr. App. MS 7 Div. 884, March 2, 1982, a copy of which appears in the appendix hereto.

JURISDICTION

The Judgment of the Circuit Court of Talladega County was entered on May 25, 1981. Appeal was made therfrom to the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals affirmed the judgment of the lower court on March 2, 1982. An application for rehearing was overruled April 20, 1982. A petition for writ of certiorari was denied by the Supreme Court of the State of Alabama and a final certificate of judgement was entered thereto on July 2, 1982. This petition to the Supreme Court of the United States was filed within 60 days of that date. This Court's jurisdiction is invoked under U.S.C. §1254.

QUESTIONS PRESENTED

1. Whether Acts of Alabama (1980) No. 80-587 is unconstitutional as violative of the Constitution of the United States because the said act delegates to the prosecuting attorney the inherently judicial function of determining whether the sentencing court is empowered to reduce or suspend the sentence of a defendant convicted under said act.

2. Whether Acts of Alabama (1980) No. 80-587 is unconstitutional as violative of United States Constitutional rights under the Eighth Amendment to be free from cruel and unusual punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America
Article I
Article II
Article III
Eighth Amendment
Acts of Alabama (1980), No. 80-587

STATEMENT OF THE CASE

Petitioner was indicted by the Talladega County Grand Jury for violation of Acts of Alabama (1980) No. 80-587. (Trafficking in Cannabis). At arraignment he entered a plea of not guilty. Appellant also filed a demurrer and motion to strike the indictment asserting that the Act was unconstitutional.

At trial, the evidence presented by the State tended to prove the material averments of the indictment, and the jury returned a verdict of guilty on May 25, 1981, assessing a fine of $25,000.00.

Petitioner was sentenced to imprisonment for nine years and was fined in accordance with the verdict. Appellant's application for probation was denied, at which time the Circuit Court remarked that the application was overruled unter the mandatory sentence provisions of the Trafficking law.

The petitioner appealed to the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals affirmed the judgment on March 2, 1982. An application for rehearing was filed on March 25, 1982, and was overruled on April 20, 1982. The Court of Criminal Appeals did not write a decision in this case. The Court's decision was as follows to wit: March 2, 1982. Affirmed on authority of Wheatt v State, Ala. Cr. App. (MS 7 Div. 884, March 2, 1982). All the judges concur. A copy of the Court of Criminal Appeals opinion in the Wheatt v State is attached to this petition.

REASONS FOR GRANTING THE WRIT

1. The decision below justifies the grant of certiorari in that it holds that Acts of Alabama (1980) No. 80-587 is valid and not violative of the United States Constitution. This act delegates to the prosecuting attorney the inherently judicial function of determining whether the sentencing court is empowered to reduce or suspend the sentence of a defendant convicted under this statute (See Alabama Code 1975, Section 20-2-81, sub section (a) and (b)). Under said statute the sentencing Court is without the power or jurisdiction to suspend a sentence or grant probation to a defendant convicted, unless the District Attorney so moves. This powerlessness under said statute to

suspend a sentence or grant probation to a convicted defendant unless the district attorney so moves is invalid as violating the doctrine of separation of powers as implied in the Constitution of the United States, Articles I, II, and III.

It is not to be doubted that the legislature can by general laws control eligibility for probation, parole and term imprisonment. What the legislature is not allowed to do by the doctrine of separation of powers, is what has been done in this statute, ie.e abort the judicial process by subjecting a judge to the control of the District Attorney. See People v. Sidener, 58 Cal. 2nd 645. The power to grant or deny probation is undeniably important in the performance of the judiciary, but under this statute the courts need license from the executive branch to carry out its judicial function.

Considered from the perspective of the doctrine of separation of powers, the District Attorney is not of the Courts and should not be allowed to determine whether a defendant's sentence is to be suspended or probation is to be granted. The effect of this statute is to violate the separation of powers implied in the U. S. Constitution, by taking a power that belongs to the Judicial branch of the government and giving it to the executive branch. The Supreme Court of the State of Alabama in the opinion below reasoned that since the Statute did not wrest from the courts the final discretion to impose sentences that there was no infringement on the constitutional division of responsibilities.

What the Alabama Supreme Court does not adequately consider is that this statute gives to the prosecutor discretion to either allow or disallow the suspension of sentence and the granting of probation to a defendant whom he had prosecuted criminally in the same court. Such discretion on the part of the prosecutor does no less than frustrate and violate the purpose of the judicial process. See People v. Novarro 7 Cal. 3rd 248 Such unbridled discretion in criminal justice violates the doctrine of separation of powers in that "probation is the ultimate and sole responsibility of the trial judge -- The lonely seat of decision belongs to no one but the trial judge."
Ross V. State 312 So. 2nd 60-61 (1975).

Giving the trial judge the final authority to impose a reduced

sentence or to suspend sentence only if the prosecutor recommends such does not preserve the necessary separation of powers between the judiciary and the executive. It is only too plain that some of the judges power of sentencing has been wrested from him by this statute and given to the prosecutor. Esteybar v The Municipal Court for the Long Beach Judicial District of Los Angeles County, 485 P.2nd 1150, (1971), and the People v The Superior Court of San Mater County, Lawrence on Tai Ho, Real Party in Interest 113 Cal. Reptr. 21, 520 P. 2nd 404 (1974).

The Above stated violation of separation of powers by the statute justifies the grant of certiorari to review the judgment and opinion of the Supreme Court of the State of Alabama below.

2. The Decision below justifies the grant of certiorari in that it holds that acts of Alabama (1980), No. 80-587 is valid and not violative of United States Constitutional rights under the Eighth Amendment to be free from cruel and unusual punishment.

The mandatory mininum of three year period of incarceration imposed by said act is prohibited by the Constitution of the United States, Amendment VIII. When the Legislature of the State of Alabama enacted this statute it imposed upon anyone convicted thereunder confinement for at least three years without regard to any of the acknowledged goals of the correctional system such as rehabilitation. The imposition of at least three years of imprisonment for the possession or sale of any quanity of marijuana in excess of 2.2 pounds but less that 2000 pounds does not take into consideration the normal and customary considerations in sentencing convicted persons such as the enormity and severity of the offense, deterrence of crime, and rehabilitative prospects of the offender. See People v Lorentzen, 194 N.W. 2nd 827 (1972).

Under this statue, probation must be denied by the sentencing judge. Such disallowance does not permit the judge to fully exercise his duty to impose a proper sentence by considering all the mitigating end aggravating circumstances involved in the crime. Williams v Oklahoma 79, S. Ct. 737. U.S. v Dawson 576 F. 2nd 656, Ross v State 312 So 2nd 61. Having been sentenced

under this statute, defendants sentence was not individualized. His sentence was contrary to the goal and principle of reformation and rehabilitation.

Under the sentence that was rigidly required to be imposed by the statute the Alabama Board of Pardon and Paroles is not allowed to consider the defendant's character, attitude, performance or rehabilitation in prison as factors toward parole or early release before at least three years of imprisonment has elapsed. This portion of the statute which precludes parole for three years violated defendant's right to be free from the imposition of cruel or unusual punishment. Smothers v State 579 P. 2nd 1062, 1064.

The requirement of a mandatory minimum sentence of three years imprisonment, constitutes cruel and unusual punishment under the United States Constitution, Eighth Amendment since it is unnecessairly severe and disporportional to the nature of the crime. This unnecessary severity and disporportionality is readily discerned when one reflects on the fact that the punishment accorded hereunder is similar to that accorded violent criminals. Defendant convicted of even the most serious offenses other than habitual offenders and capital murders, are eligible for consideration for parole, good time, and incentive good time which under the laws of Alabama can reduce the prospect of confinment to less that three years when as little as a ten year sentence is imposed. See Code of Alabama, 1975, Sections 13A-5-9 and 13A-5-30 et. seq. violation of United States Constitution, Eightn Amendment right to be free from cruel and unusual punishment is especially apparent when one considers that the same minimum sentence is imposed for mere constructive possession of 2.2 pounds of marijuana as for any actual sale of 1999 pounds. Such sentencing is grossly disporportionate to the severity of the crime. Said statute does not differentiate on reasonable grounds between serious and minor offense and does not prescribe proportionate penalities for each.

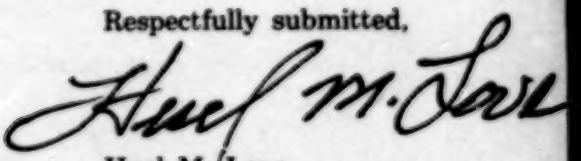
Defendant contends that his punishment, which is devoid of the possibility of probation and even of parole before the elapse of three years in incarceration, is grossly disproportionate to the nature of the crime of which he was convicted and as such

violated his eighth amendment right to be free from the infliction of cruel and unusual punishment.

The above stated reasons justify the grant of certiorari to review the judgment below.

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Alabama.

Respectfully submitted,



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APPENDIX

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-82

7 Div. 884

Robert Wheatt
V

State

Appeal from Talladega Circuit Court

BOWEN, JUDGE

The defendant was indicted and convicted of trafficking in cannabis in violation of Alabama Code 1975, Section 20-2-80 (1) (a) (Supp. 1981) 1. Sentence was six years' imprisonment and a fine of $25,000.00. The issues on appeal concern the constitutionality of Alabama's drug trafficking statutes.

The defendant's argument that the fining of an indigent defendant is unconstitutional is without merit. Under the defendant's reasoning, any fine levied against an indigent is excessive simply because the defendant is unable to pay the fine. Because the imprisonment of an indigent offender for failure to pay his fine is generally recognized as constitutionally impermissible, Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L.Ed. 2d 586 (1970); Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), the result advocated by the defendant would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisomment for nonpayment whereas other defendants must always suffer one or the other on conviction. Tate, 401 U.S. at 399, 91 S. Ct. at 671. As noted in Tate, supra, and Williams, 399 U.S. at 244-5, 90 S.Ct. at 2024, there are other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines, i.e., paying fines in installments.

In arguing that his fine is excessive and a denial of due process the defendant relies solely on Castle v. United States, 399 F.2d 642 (5th Cir. 1968). There the court found that the indigent defendant's sentence of ten years' imprisonment and fine of $10,000.00 on conviction of transporting five forged money orders in interstate commerce was not excessive punishment. The court noted that appellate courts have generally refused to disturb the trial court's discretion in sentencing unless the punishment is so disproportionate to the offense committed as to be arbitrary and shocking to the sense of justice and thus to constitute cruel and unusual punishment in violation of the Eighth Amendment. "The cases are legion that a sentence within the statutory limits is not cruel and unusual punishment" Castle, 399 F. 2d at 652.

In Castle, the court also answered the defendant's contention that the mandatory fine violated his right to due process by serving no rehabilitative purpose.

"It might be argued that the excessive fining of an indigent violates substantive due process of law because it does not serve a legitimate end of punishment and, in fact, interferes with rehabilitation. The Supreme Court as recently indicated, however, that rehabilitation is not the only end of punishment and that special and general deterrence are still valid considerations in making the punishment fit the crime. Powell v. State of Texas, 1968, 392 U.S. 514, 88 S. Ct. 2145, 2153, 20 L.Ed. 2d 1254." Castle, 399 F.2d at 652.

See also Gregg v. Georgia, 428 U.S. 153, 184, 96 S.Ct. 2909, 2930, no. 30, 49 L Ed. 2d 85 (1976).

In People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338 (1975), it was recognized that rehabilitation is only one of the recognized purposes of penal sanctions. The highest appellate court for the State of New York noted:

"Faced with what it found to be a high recidivism rate in drug-related crimes, an inadequate response to less severe punishment, and an insidiously growing drug abuse problem, the Legislature could reasonably shift the emphasis to other penalogical purposes, namely isolation and deterrence."

"Thus, to achieve the deterrence, so far seemingly elusive, the would-be drug trafficker has to be put on notice that, should he be caught, his fate was sealed regardless of his position in the hierarchy of distribution and regardless of the quantity of drugs in which he dealt." Broadie, 332 N.E.2d at 344.

This entire area is summed up in Hindt v. State, 421 A.2d 1325 (Del. Supr. 1980).

"Very little case law exists on the subject of constitutinally excessive fines. We find well stated, however, the guidelines set forth in State v. Trailer Service, Inc., Wis.Supr., 61 Wis.2d 400, 212 N.W.2d 683, 689 (1973):

"To determine excessiveness of a fine in a constitutional sense, consideration should be given to the object designed to be "accomplished, to the importance and magnitude of the public interest sought to be protected, to the circumstances and nature of the act for which it is imposed, and in some instances the ability of the accused to pay." 24B C.J.S. Criminal Law, Section 1978c, p. 557 (1962). For a fine to be unusual or excessive, it must be so disproportionate to the offense as to shock public sentiment and contrary to the judment of reasonable people conserning what is proper under the circumstances." 421 A. 2d at 1333.

The fine levied against the defendant in this case was fixed and required by statute. Considering the serious problem Section 20-2-80 seeks to combat, the importance of the public interest sought to be protected and the enormous illegal profits involved in the undetected sale of marijuana, the mandatory $25,000.00 fine does not shock our sense of justice and is not disproportionate to the offense committed.

II

The defendant contends that Section 20-2-80(1)(a) constitutes cruel and unusual punishment because it requires a minimum term of imprisonment of three calendar years upon conviction of the possession or sale of a quantity of marijuana in excess of 2.2 pounds but less than 2,000 pounds.

In Broadie, supra, the Court of Appeals of New York upheld "drug" laws which contained sentencing provisions imposing a mandatory maximum sentence of life imprisonment and minimum from one or six years to eight and one-third years against a challenge that such provisions constituted cruel and unusual punishment.

" The principal issue is whether the so-called 'drug' laws, in mandating life imprisonment and, therefore, lifetime parole on parole release, prescribe sentences so disproportionate as

would constitute cruel and unusual punishment in violation of constitutional limitations .....

"There should be an affirmance. The sentences are not grossly disproportionate in constitutional analysis. The Legislature may no distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonable views them, punishments appropriate to each." Broadie, 371 N.Y.S. 2d at 474-5.

After analyzing the history and purpose of the cruel and unusual punishment clause, the court noted that drug trafficking was a grave offense and posed a serious threat to society. The court found that the severe punishment of the drug trafficking statute was constitutionally permissible.

"Summarizing the various factors and comparisons pertinent to gross disproportionality, the Legislature could reasonably conclude that drug trafficking was a grave offense; that the defendants, as sellers, posed a serious threat to society; and that the sentencing statutes, though severe and inflexible, would serve, at least, to isolate and deter. Compared both 'internally', to punishments for other crimes under the Penal Law, and 'externally', to punishments imposed elsewhere for the same or similar offenses, the narcotics laws are relatively severe, but not irrationally so, given the epidemic dimensions, of the problem.

"On this analysis, the punishments in these cases were not so grossly disproportionate that they may be declared unconstitutional."

Broadie, 332 N.E.2d at 345.

Florida has a drug trafficking statute very similar to Alabama's. In State v. Benitez, 395 So.2d 514 (Fla. 1981), the Supreme Court of Florida held that although the penalties of the drug trafficking statute were "certainly severe" they were

"by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved."

"Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. See, e.g., McArthur v. State, 351 So.2d 972 (Fla. 1977); Banks v. State, 342 So.2d 469 (Fla. 1976); O'Donnell v. State, 326 So.2d 4 (Fla. 1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case- wherein the sentence was grossly disproportionate to the severity of the crime- the legislature's judgment would run afoul of the constitutional prohibitions, this court has never addressed such a situation in the context of statutory sentencing minima.

"The recent decision of the United States Supreme Court in Rummel v. Estelle, 445, U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

"(t)his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime.... In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to

Rummel.

"Outside the context of capital punishment, successful challenges to the proportonality of particular sentences have been exceedingly rare.

"Id., 445 U.S. at 271, 100 S. Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, Weems v. United States, 217 U.S. 349, ' ' Ct. 544, 54 L.Ed. 793 (1910), the majority concluded

"Given the unique nature of the punishments considered in Weems in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

"Id., 445 U.S. at 273, 100 S. Ct. at 1139 (footnote omitted).,, Benitez, 395 So.2d at 518.

We conclude that the mandatory sentences of Alabama's drug trafficking law do not constitute cruel and unusual punishment. See also Paras v. State, 247 Ga. 75 274 S.E. 2d 451 (1981); Opinion of the Justices to the House of Representatives, 393 N.E. 2d. 313 (Mass. 1979).

III

The defendant argues that Section 20-2-81(b)2 denies equal protection of the law to persons convicted of drug trafficking who cannot provide "substantial assistance" to law enforcement officials. In Benitez, 395 So 2d at 519, the Florida Supreme Court found this same argument "patently without merit." As the court did in Benitez, we find that Section 20-2-81 (b) does not operate to deny the defendant equal protection because it passes the "rational basis test." Legislation which does not affect a fundamental" right or a "suspect" class need only bear a "rational relationship" to a legitimate state interest. Thus a classification which does not

affect a fundamental right or a supect class will be upheld unless the varying treatment of different groups or persons is so unrelated to the achievement of any combinationn of legitimate purposes that a court can only conclude that the legislature's actions were arbitrary and irrational. The National Organization For The Reform of Marijuana Laws v. Bell, 488 F.Supp. 123 (D.D. C. 1980). Separate treatment of defendants does not violate any constitutinal guarantee of equal protection so long as that treatment is reasonable and founded on a rational basis.

IV

Finally, the defendant argues that the drug trafficking provisions of the Alabama Code are unconstitutional because the trial judge cannot grant probation or reduce sentence unless the prosecuting attorney so moves the court. Section 20-2-81(b). This same argument was advanced in Benitez and rejected by the Supreme Court of Florida.

"Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection ((3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence.So long as a statute does not wrest from the courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities.' People v. Eason, 40 N.Y. 2d 297, 301, 386 N.Y.S. 2d 673, 676, 353 N.E. 2d 587, 589 (1976) (emphasis in original) rejecting a separation of powers attack on a similar provision in New York's drug laws)." Benitez, 395 So.2d at 519.

We hold that Alabama's drug trafficking provisions (Sections 20-2-80-1) are constitutional. The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges Concur.

1. Alabama Code 1975, Section 20-2-80 (Supp. 1981) provides in pertinent part:

"Except as authorized in chapter 2, Title 20

"(1) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as 'trafficking in cannabis'. If the quantity of cannabis involved ;

"a. Is in excess of one kilo or 2.2 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory term of imprisonment of three calendar years and to pay a fine of $25,000.00."

2. Alabama Code 1975, Section 20-2-81 (Supp. 1981) provides:

"(a) Notwithstanding the provisions of chapter 22, Title 15, with respect to a person who is found to have violated this article, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this article.

"(b) The prosecuting attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this article and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance. (Acts 1980, N. 80-587, p. 926.)"

IN THE SUPREME COURT OF ALABAMA

PALMER G. HOLCOMBE,		COURT OF
APPELLANT		CRIMINAL APPEALS
VS.		
THE STATE OF ALABAMA,		CASE NUMBER
APPELLEE		7th DIV. 869

CIRCUIT COURT OF TALLADEGA COUNTY

SC NO. ----------

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA:

Comes your petitioner, Palmer G. Holcombe, and petitions this Court for a Writ of Certiorari to issue to the Court of Criminal Appeals of Alabama, in the above-styled cause under Rule 39, Ala. R. App. P., and shows the following:

1. Petitioner was convicted of the offense of Trafficking in Cannabis in the Circuit Court of Talladega County, Alabama, on May 25, 1981. The Court of Criminal Appeals affirmed the judgment on March 2, 1982. An application for rehearing was filed on March 15, 1982. An application for reharing was filed on March 15, 1982, and was overruled on April 20, 1982.

2. The Court of Criminal Appeals wrote no opinion in this case. Petitioner was notified of the decision by a letter from the Court of Criminal Appeals dated March 2, 1982, a copy of which is attached to this peitition, which shows the Court of Criminal . ppeals Case No. 7th Div. 869.

The decision of the Court of Criminal Appeals in this case was

as follows, to-wit:
"March 2, 1982. Affirmed on authority of Wheatt v. State, Ala. Cr. App. (Ms. 7 Div. 884, March 2, 1982). All the Judges concur."

A copy of the Court of Criminal Appeals opinion in Wheatt v. State, Ala. Cr. App. (Ms. 7 Div. 884, March 2, 1982), is attached to this petition.

4. Petitioner, along with application for rehearing, under Rule 39 (k), Ala. R. App. P., presented an additional statement of facts to the Court of Criminal Appeals, and requested, by motion, that said Court incorporate said additional facts in its opinion on rehearing. The Court of Criminal Appeals overruled the application for rehearing without opinion, and further failed to grant petitioners Motion to Add Statement of Facts. Petitioner has attached hereto as Appendix "A", copy of said additional statement of facts, and incorporates said statement as a part of this petition, the same as if fully set forth herein.)

5. Petitioner alleges as grounds for the issuance of the writ the following :

(1) The decision of the Court of Criminal Appeals in this case is a decision initially holding that Acts of Alabama (1980), No. 80-587 is valid, and not unconstitutionally violative of Constitution of Alabama (1901), Section 43, as amended by Amendment Number 38. The issue presented in the Court of Criminal Appeals by petitioner, was whether said act was unconstitutional under these constitutional provisions because said act delegates to the prosecuting attorney the inherently judicial functions of determining whether the sentencing Court is empowered to reduce or suspend the sentence of a defendant convicted under the act.

The pertinent provision of the act is as follows :

(b) Notwithstanding the provisions of Chapter 22, title 15, Code of Alabama 1975, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall

such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(c) The prosecuting attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, ... The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

Acts of Alabama (1980), No. 587, Section 1 (b) and (c).

The pertinent provisions of the State Constitution are as follows:

Section 43. Separation of Powers

In the government of this state, except in the instances hereinafter expressly directed or permitted,the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judical shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

Amendment No. 38

The governor shall have power to grant reprieves and commutations to persons under sentence of death. The legislature shall have the power to provide for and to regulate the administration of pardons, paroles, remission of fines and forfeitures, and may authorize the courts having criminal jurisdiction to suspend sentence and to order probation. No pardon shall relieve from civil and political disabilities unless specifically expressed in the pardon.

(2) The decision of the Court of Criminal Appeals in this case is a decision initially hold that Acts of Alabama (1980), No. 80-587 is valid and not unconstitutionally violative of the provisions of the State Constitution and the Federal

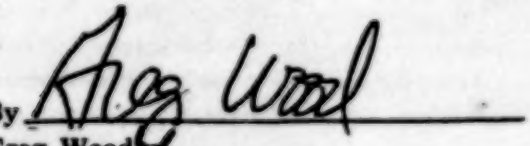
Constitution forbidding cruel or unusual punishment.

Petitioner respectfully requests that after a preliminary examination, the writ of certiorari be granted and that this Court proceed under its rules to review the matters complained of, and to reverse the judgment of the Court of Criminal Appeals, and for such other relief as Petitioner may be entitled.

I certify that I have this day served copies of this Petition and the brief on all other parties to the appeal in the Court of Criminal Appeals.

Respectfully submitted this 4th day of May, 1982.

LOVE, LOVE, LAWRENCE & WOOD

By 
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"ATTACHMENT"

IN THE COURT OF CRIMINAL APPEALS
OF ALABAMA

PALMER G. HOLCOMBE

APPELLANT

VS.

THE STATE OF ALABAMA

APPELLEE

On Appeal from the Circuit Court of Talladega County, Alabama

CASE NO. 7th Div. 869

MOTION TO ADD STATEMENT OF FACTS

Appellant moves the Court, pursuant to Ala. R. App. P. 39 (k), to adopt the Statements contained in Exhibits A and B. attached hereto as additional facts in this Court's written opinion in this case. As grounds appellant shows unto the Court the Following ;

1. That this Court issued no written opinion in this case other than the following

"March 2, 1982, Affirmed on authority of Wheatt v. State, Ala. Cr. App. (Ms. 7 Div 884 March 2, 1982). All the Judges concur."

2. That appellant anticipates seeking review by Certiorari of this Court's decision in this case, in the event appellant is unsuccessful in his application for rehearing before this Court.

3. That the proposed additions are necessary to enable appellant to seek said review by certiorari.

LOVE, LOVE, LAWRENCE & WOOD

By Greg Wood

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EXHIBIT A

STATEMENT OF THE CASE

Appellant was indicted by the Talladega County Grand Jury for violation of Acts of Alabama (1980) No. 80-587. (Trafficking in Cannabis). At arraignment he entered a plea of not guilty. Appellant also filed a demurrer and motion to strike the indictment asserting that the Act was unconstitutional.

At trial, the evidence presented by the State tended to prove the material averments of the indictment, and the jury returned a verdict of guilty, assessing a fine of $25,000.00.

Appellant was sentenced to imprisonment for nine years and was fined in accordance with the verdict. Appellant's application for probatin was denied, at which time the Circuit Court remarked that the application was overruled under the mandatory sentence provisions of the Traffficking law.

EXHIBIT B

(The following excerpts are taken from the opinion of this Court in Wheatt v state, Ala. Cr. App. (Ms. 7 Div. 884, March 2, 1982), as incorporated in this Court's ruling in the instant case.)

II

The defendant contends that Section 20-2-80 (1) (a) constitutes cruel and unusual punishment because it requires a minimum term of imprisonment of three calendar years upon conviction of the possession or sale of a quantity of marijuana in excess of 2.2 pounds but less than 2,000 pounds.

In Broadie, supra, the Court of Appeals of New York upheld "drug" laws which contained sentencing provisions imposing a mandatory maximum sentence of life imprisonment and minimum from one or six years to eight and one-third years against a challenge that such provisions constituted cruel and unusual punishment.

"The principal issue is whether the so called 'drug' laws, in mandating life imprisonment and, therefore, lifetime parole on parole release, prescribe sentences so disproportionate as would constitute cruel and unusual punishment in violation of constitutional limitations...

"There should be an affirmance. The sentences are not grossly disproportionate in constitutional analysis. The Legislature may distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each." Broadie, 371 N.Y.S. at 474-5

After analyzing the history and purpose of the cruel and unusual punishment clause, the court noted that drug trafficking was a grave offense and posed a serious threat to

society. The Court found that the severe punishement of the drug trafficking statute was constitutionally permissable.

"Summarizing the various factors and comparisons pertinent to gross disproportionality, the Legislature could reasonably. conclude that drug trafficking was a grave offense; that the defendants, as sellers, posed a serious threat to society; and that the sentencing statutes, though severe and inflexible would serve, at least, to isolate and deter. Compared both internally', to punishments for other crimes under the Penal Law, and 'externally', to punishments imposed elsewhere for the same or similar offenses, the narcotics laws are relatively the epidemic dimensions of the problem.

"On this analysis, the punishments in these cases were not so grossly disproportinate that they may be delared unconstitutional." Broadie, 382 N.E.2d at 345

Florida has a drug trafficking statute very similar to Alabama's. In State v. Benitez, 395 So. 2d 514(Fla. 1981), the Supreme Court of Florida held that although the penalties of the drug trafficking statute were "certainly severe" they were "by no means cruel and unusual in light of their potential deterrent value and the seriousness of crime involved."

"Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since thy are unneccessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. See,e.g., McArthur v. State, 351 so.2d 972 (Fla. 1977); Banks v. State,342So 2d 469 '(Fla. 1976);O'Donnell v. State 326 So.2d 4 (Fla.1975).

The dominant theme which runs through these decisions is that the legislature,and not the judiciary,determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case- wherein the sentence was grossly

disproportionate to the severity of the crime-the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

"The recent decision of the United States Supreme Court in Rummel v Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidvist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

"(t) his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime...In recent years this proposition has appeared most frequently in opinions dealing with the death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.

"Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

"Id.,445 U.S. at 271, 100 S. Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L.Ed.793 (1910), the majority concluded:

"Given the unique nature of the punishments considered in Weems in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislaturive prerogative.

"Id. 445 U.S. at 273, 100 S. Ct. at 1139 (footnote omitted)" Benitez, 395 So 2d at 518.

We conclude that the mandatory sentences of Alabama's drug trafficking law do not constitute cruel and unusual punishment. See also Paras v. State, 247 Ga.75,274S.E.2d 451 (1981); Opinion of the Justices To The House of Representatives, 393 N. E. 2d 313 (Mass. 1979)

IV

Finally, the defendant argues that the drug trafficking provisions of the Alabama Code are unconstitutional because the trial judge cannot grant probation or reduce sentence unless the prosecuting attorney so moves the court. Section 20-2-81 (b). This same argument was advanced in Benitez and rejected by the Supreme Court of Florida.

"Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. 'So long as a statute does not wrest from the courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities.' People v. Eason, 40 N.Y. 2d 297, 301, 386 N. Y. S. 2d 673, 676, 353 N. E. 2d 587, 589, (1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws)." Benitez, 395 So 2d at 519.

We hold that Alabama's drug trafficking provisions (Sections 20-2-80-1) are constitutional. The judgment of the circuit court is affirmed.

AFFIRMED

All Judges Concur."

RE: Palmer G. Holcombe v. State
7 Div. 869, Talladega Circuit Court No. CC80-398

The Court of Criminal Appeals today announced the following decision in the above-styled cause:

"March 2, 1982. Affirmed on authority of Wheatt v. State, Ala. Cr. App. (Ms. 7 Div. 884, March 2, 1982). All the Judges concur."

(COPY OF WHEATT OPINION ATTACHED)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No._____

Palmer G. Holcombe, Petitioner

v

State of Alabama, Respondent

I hereby certify that on this 1st day of September 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Charles Graddick Esq., Administrative Building, 64th North Union Street, Montgomery, Alabama 36130. Counsel for the Respondent. I further certify that all parties required to be served have been served.

Huel M. Love

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